United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-6007,8

To be argued by
WILLIAM R. BRONNER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 75-6007, 8

UNITED STATES OF AMERICA,
Petitioner-Appellee,

—v.—

FIRST NATIONAL CITY BANK;
Respondent-Appellant,

CHEMICAL BANK,
Respondent,

—and—

MILTON F. MEISSNER,
Appellant.

ON APPEAL FROM ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

WILLIAM R. BRONNER,
STEVEN J. GLASSMAN,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

PAGE

Statement of the Case 1

The Proceedings Below 2

Previous Proceedings in this Court 3

Statement of Facts 3

Issues Presented for Review 4

ARGUMENT:

POINT I—The District Court possessed jurisdiction over these summary proceedings 7

POINT II—The District Court was correct in refusing to allow Meissner's intervention and in ordering compliance with the levies 13

A. There is no basis for Meissner's intervention.. 13

B. The Government is entitled to enforcement of the levies 18

POINT III—Meissner's appeal should be dismissed 20

A. The Court should deny Meissner any consideration on equitable grounds 20

B. Meissner has waived his allegedly infringed rights by his refusal to subject himself to the jurisdiction of the Court 21

POINT IV—Both appeals are defective 25

A. The appeals are moot as to the interim relief obtained 25

B. The order affecting the Citibank box is not final, and the appeals of that order are therefore premature 27

PAGE

C. Chemical Bank's compliance with the District Court order enforcing the administrative levy moots Meissner's appeal concerning the Chemical Bank box 29

CONCLUSION 31

TABLE OF AUTHORITIES

Alexander v. *"Americans United", Inc.*, 416 U.S. 752 (1974) 16

Alford v. *United States*, 113 F.2d 885 (10th Cir. 1940) 18

Allen v. *Georgia*, 166 U.S. 138 (1897) 21

Baldridge v. *United States*, 406 F.2d 526 (5th Cir. 1969) 30

Blair v. *United States*, 250 U.S. 273 (1919) 22

Bob Jones University v. *Simon*, 416 U.S. 725 (1974) 15

Bouschor v. *United States*, 316 F.2d 451 (6th Cir. 1963) 24

Boyd v. *United States*, 116 U.S. 616 (1886) 15, 16

Brotherhood of Railroad Trainmen v. *Baltimore & Ohio RR. Co.*, 331 U.S. 519 (1947) 13

Brownlow v. *Schwartz*, 261 U.S. 216 (1923) 26

Carples v. *Cumberland Coal Co.*, 240 N.Y. 187 (1925) 18, 19

Catlin v. *United States*, 324 U.S. 229 (1945) 28, 29

Cinerama, Inc. v. *Sweet Music, S.A.*, 482 F.2d 66 (2d Cir. 1973) 28, 29

City of Detroit v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) 29, 30

Cobbledick v. *United States*, 309 U.S. 323 (1940) 29

Cohen v. *Beneficial Industrial Loan Corp.*, 367 U.S. 541 (1949) 29

PAGE

Cohen v. *Manufacturers Safe Deposit Co.*, 297 N.Y. 266 (1948) 18

Colton v. *United States*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963) 24

Couch v. *United States*, 409 U.S. 332 (1973) 16, 19, 23

Cover v. *Schwartz*, 133 F.2d 541 (2d Cir. 1942), *cert. denied*, 319 U.S. 748 (1943) 30

Donaldson v. *United States*, 400 U.S. 517 (1971) 11, 14, 16, 23

Estelle v. *Dorrough*, Docket No. 74-479 (*per curiam*, March 17, 1975), 43 U.S.L.W. 3497 21-22

F.T.C. v. *Browning*, 435 F.2d 96 (D.C. Cir. 1970) 30

Hale v. *Henkel*, 201 U.S. 43 (1906) 23

Hoffman v. *United States*, 341 U.S. 479 (1951) 22, 24-25

I.I.T. v. *Vesco*, Docket Nos. 74-1969, 2366, 2341 (2d Cir. April 28, 1975) 4

In re Fahey, 300 F.2d 383 (6th Cir. 1962) 24

In re Horowitz, 482 F.2d 72 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973) 23, 24

Irving v. *Gray*, 479 F.2d 20 (2d Cir. 1973) 20

Jenkins v. *United States*, 325 F.2d 942 (3rd Cir. 1963) 28

Kurshan v. *Riley*, 484 F.2d 952 (4th Cir. 1973) 30

Maness v. *Meyers*, 419 U.S. 449 (1975) 16, 17

Martin v. *Chandis Securities Co.*, 128 F.2d 731 (9th Cir. 1942) 12

McAlister v. *Henkel*, 201 U.S. 90 (1906) 24

Mendenhall v. *Allen*, 346 F.2d 326 (7th Cir. 1965) 14

Molinaro v. *New Jersey*, 396 U.S. 365 (1970) 21

National Safe Deposit Co. v. *Illinois*, 232 U.S. 58 (1914) 19

PAGE

National Union of Maritime Cooks and Stewards v. *Arnold*, 348 U.S. 37 (1954) 21

New Hampshire Fire Insurance Co. v. *Scanlon*, 362 U.S. 404 (1960) 8

Phelps v. *United States*, — U.S. —, No. 74-121, 75-1 U.S.T.C. ¶ 9467 (May 19, 1975) 14, 15

Phillips v. *Commissioner*, 283 U.S. 589 (1931) 19

Reisman v. *Caplin*, 375 U.S. 440 (1964) 16

Republic of China v. *American Express Co.*, 190 F.2d 334 (2d Cir. 1951) 28

Roberts v. *Stuyvesant Safe Deposit Co.*, 123 N.Y. 57 (1890) 18

Rogers v. *United States*, 340 U.S. 367 (1951) 24

Rosenblum v. *United States*, 300 F.2d 843 (1st Cir. 1962) 13, 14-15

Ruetz v. *Lash*, 500 F.2d 1225 (7th Cir. 1974) 21

S.E.C. v. *Stewart*, 476 F.2d 755 (2d Cir. 1973) 4

Shupack v. *Groth*, 498 F.2d 675 (5th Cir. 1974) 30

Streep v. *United States*, 160 U.S. 128 (1895) 21

Suarez v. *Commissioner*, 48 T.C. 792 (1972) 15

United States ex rel. Bailey v. *Commanding Officer, etc.*, 496 F.2d 324 (1st Cir. 1974) 21

United States v. *Boccuto*, 175 F. Supp. 886 (D.N.J.), *appeal dsmd.*, 274 F.2d 860 (3rd Cir. 1959) 24

United States v. *Goldfarb*, 328 F.2d 280 (6th Cir.), *cert. denied*, 377 U.S. 976 (1964) 24

United States v. *Guterma*, 272 F.2d 344 (2d Cir. 1959) 16, 17

United States v. *Judson*, 322 F.2d 460 (9th Cir. 1963) 24

United States v. *Kasmir*, 499 F.2d 444 (1974), *cert. granted*, 420 U.S. 906 (1975) 24

PAGE

United States v. *Mellon Bank, N.A.*, 74-2 U.S.T.C. ¶ 9797 (W.D. Pa. October 16, 1974) 5

United States v. *O'Connor*, 291 F.2d 520 (2d Cir. 1961) 14

United States v. *Pittman*, 449 F.2d 623 (7th Cir. 1971) 14, 15

United States v. *Sterling National Bank & Trust Co.*, 494 F.2d 919 (2d Cir. 1974) 18

United States v. *White*, 322 U.S. 694 (1944) 24

Vesco v. *S.E.C.*, 462 F.2d 1350 (3rd Cir. 1972) 26, 30

Wong Sun v. *United States*, 371 U.S. 471 (1963) 15

Ziegler v. *United States*, 174 F.2d 439 (9th Cir.), *cert. denied*, 338 U.S. 822 (1949) 24

STATUTES

United States Constitution

Article III, Section 2 30

Fourth Amendment 15, 22-23

Fifth Amendment 16, 22-25

United States Code

Title 26

Section 6321 14

Section 6322 14

Section 6331 ..... 5, 8, 10, 16

Section 6332 ..... 18, 19

Section 6334 19

Section 6861 ..... 2, 5

Section 7402 ..... 2, 8-11, 12

Section 7403 14

Section 7426 ..... 13, 26

PAGE

Title 28

Section 1291 29

Section 1651 9

Section 2463 14

Judiciary Act of 1789 9

Revenue Act of 1918, c. 18, § 1318 (approved February 24, 1919) 40 Stat. 1057, 1148 9

Revenue Act of 1916 (approved September 8, 1916), c. 463, § 20, 39 Stat. 756, 776 9

Federal Rules of Civil Procedure

Rule 2 10

Rule 3 10

Rule 4 12

Rule 24 13

Rules for the Administration of the Individual Calendar Assignment System

Rule 6 11

New York Banking Law (McKinney 1971)

Section 317 18

Section 332 18

New York Session Laws

L. 1958 ch. 879 § 12 18

L. 1875 ch. 613 § 1 18

OTHER AUTHORITIES

Moore, *Federal Practice* (2d Ed.)

§ 3.04 ..... 9, 10

§ 110.26 9

5 N.Y. Jur. *Banks* § 282 18

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 75-6007, 8

UNITED STATES OF AMERICA,
Petitioner-Appellee,

—v.—

FIRST NATIONAL CITY BANK,
Respondent-Appellant,

CHEMICAL BANK,
Respondent,

—and—

MILTON F. MEISSNER,
Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Statement of the Case

These are two separate appeals from an opinion and orders of the Honorable Lloyd F. MacMahon, United States District Judge, Southern District of New York, granting duplicate petitions by the United States for orders that First National City Bank ("Citibank") and Chemical Bank (together the "banks") allow, at the expense of the United States, the forcible opening of safe deposit boxes leased by them to appellant Meissner for the purpose of determining the nature of the contents thereof, and denying Meissner's motion for leave to intervene.

The Proceedings Below:

These cases were begun in the District Court in October, 1974, by the initiation of summary proceedings for the "enforcement of the internal revenue laws" under 26 U.S.C. § 7402(a) following a jeopardy assessment against Meissner pursuant to 26 U.S.C. § 6861. On October 4, the Government filed duplicate petitions and Judge Constance Baker Motley issued orders directing the respondent banks to show cause why the Government should not be allowed to obtain entry into safe deposit boxes leased by them to Milton F. Meissner. The banks opposed the requested relief, and Meissner moved to intervene. The motions were heard by Judge Lloyd F. MacMahon, who filed an opinion dated December 31, 1974, granting the Government's petitions and denying Meissner's motion.

Thereafter, the Government immediately submitted two proposed orders. Chemical Bank submitted a proposed counter-order to which the Government consented, which set forth a procedure for "comply[ing] with the notice of levy" and which provided that the United States "shall obtain possession of any property . . . contained in said safe deposit box" (1b).* Citibank objected to the Government's proposed order, but did not submit any counter-order of its own. In addition, Meissner and Citibank submitted motions for reargument, and Meissner moved for a stay pending appeal.

On January 27, 1974, (orders filed on January 28, 1975) Judge MacMahon took several actions: (1) he signed the

---

* References followed by "a" are to the appendix filed with the Government's brief in opposition to a stay without bond. This Court has allowed the parties to utilize that appendix for purposes of the present appeal. References followed by "b" are to the supplemental appendix filed with the Government's motion to dismiss the appeals.

Government's order as against Citibank and Chemical Bank's counter-order; (2) he granted Meissner's and Citibank's motions for reargument, but upon reargument he adhered to his original decision; (3) he granted Meissner's motion for a stay of the orders allowing entrance into the two boxes, as noted above, but conditioned that stay upon the posting of $260,000 cash or surety bond within 48 hours of his filing a notice of appeal. This amount, $260,000, was the Government's approximation of the total accrued tax liability. The latter ruling in effect granted a stay until expiration of the statutory period for filing a notice of appeal.

On March 27, 1975, Citibank moved the District Court for a stay of the order affecting it pending appeal. On April 2, 1975 Judge MacMahon granted that motion, but again conditioned the stay upon posting of $260,000 security by April 4, 1975.

Previous Proceedings in this Court

On March 26, 1975, Meissner moved this Court for a stay without bond of Judge MacMahon's orders, which motion was returnable on April 8, 1975. On April 2, 1975, upon hearing of Judge MacMahon's decision on Citibank's motion, the Government on consent moved a one-week adjournment of Meissner's stay motion to this Court, to permit Citibank the option of complying with Judge MacMahon's order or filing a motion in this Court which could be heard together with Meissner's motion. Citibank moved this Court for a stay of Judge MacMahon's order affecting it on April 7, 1975. Both motions were argued on April 15, 1975, and were denied from the bench (Kaufman, Ch. J. and Timbers, J.).* Subsequent appeals to Mr. Justice

---

* The parties stipulated to argue the motion to a two-judge panel.

Marshall for stays without bond were likewise denied. Thereafter, on April 22, 1975, the Government forcibly entered the safe deposit boxes; inventories of their contents were filed in the District Court on June 6, 1975.

The Government's motion to dismiss both appeals on various grounds was denied by this Court on July 15, 1975, without prejudice to renewal before the panel that will hear the appeal (Van Graafeiland, Moore, and Friendly, J.J.).

Statement of Facts

Appellant Milton F. Meissner is a taxpayer who formerly was in the employ of and eventually became President of Investors Overseas, Ltd. ("I.O.S."). His role in that organization has been the subject of separate Internal Revenue Service ("I.R.S.") civil and criminal investigations as well as investigation by the Securities and Exchange Commission ("S.E.C.") in which his testimony was taken and which resulted in civil litigation in this Circuit, *see I.I.T.* v. *Vesco*, Dkt. Nos. 74-1969, 2366, 2341 (2d Cir., April 28, 1975); *see also S.E.C.* v. *Stewart*, 476 F.2d 755 (2d Cir. 1973). In a subsequent grand jury investigation he failed to comply with a subpoena which had been served on him, and on March 5, 1974, United States District Judge Milton Pollack ordered Meissner to appear before the Grand Jury for the Southern District of New York on March 18, 1974. He failed to appear, and on April 1, 1974, United States District Judge Charles H. Tenney ordered his arrest.

At the time the arrest order was signed, Meissner was involved in a civil investigation of his income tax liability for the years 1970 and 1971. On April 9, 1974, eight days after the signing of the order of arrest, the Director of International Operations of the I.R.S., the proper delegate in the circumstances,* made a jeopardy assessment for the

---

* Meissner was then residing in Nassau, the Bahamas. He is still understood to be residing abroad either in the Bahamas or in Costa Rica. No extradition proceedings against him have been instituted to date.

taxes then believed due and owing. The amount assessed, including statutory additions, was $259,125.88 as of June 1, 1974, plus interest thereafter. Notice of assessment and demand for payment were immediately issued pursuant to 26 U.S.C. § 6861(a). Also, pursuant to 26 U.S.C. § 6861(b), the I.R.S. issued to Meissner a notice of deficiency entitling him to litigate his liability before the Tax Court. Meissner has filed a petition for redetermination of the assessed deficiency in the Tax Court, where the tax liability will ultimately be determined.*

As part of its civil tax collection efforts pursuant to the jeopardy assessment (see 26 U.S.C. § 6331(a)), the I.R.S. on April 10, 1974 levied upon the contents of two safe deposit boxes leased by Meissner from New York City banks. At about the same time, the I.R.S. also levied upon the contents of a third safe deposit box located in Pennsylvania, and not involved herein.** The levies were accomplished by delivering copies of a Notice of Levy to the lessor banks. The property was not surrendered by either bank, although the boxes were apparently sealed pending further developments. The matter was then referred to the United States Attorney for the Southern District of New York for the purpose of commencing appropriate legal proceedings to determine the nature of the contents of the safe deposit boxes. Negotiations were initiated by the United States Attorney with counsel for Citibank. When this avenue proved fruitless, two petitions were filed on October 4, 1974, and orders to show cause were signed on that date. In the interim, on August 30, 1974, the United States Attor-

---

* Those proceedings have been stayed pending the completion of the I.R.S. criminal investigation.

** Litigation was commenced as regards this box as well; the matter is now pending before the Court of Appeals for the Third Circuit on Meissner's appeal from a decision by the District Court for the Western District of Pennsylvania in the Government's favor. That decision is unofficially reported at 74-2 USTC ¶ 9797.

ney was contacted by Meissner's attorney, and as a professional courtesy the United States Attorney agreed to send him copies of papers filed.

The safe deposit boxes were opened on April 22, 1975, and various items of value were found, plus certain documents. The contents of the Chemical Bank safe deposit box (a coin, currency, and precious metals collection) are presently in the Government's custody, where they will remain until the outcome of the pending Tax Court proceeding,* unless bond or collateral security is posted. At the conclusion of the Tax Court proceedings, such amount of Meissner's assets as is required to satisfy the tax deficiency as redetermined will be liquidated.

After inventorying of the contents of the Citibank box, the broken lock was replaced with a new lock and the contents were returned to the box. Citibank and the Government each possess one key to the box. Both together are necessary to open it. At the present time, the Government has represented to the District Court that it will initiate further actions or proceedings to obtain those items which are leviable or as to which the Government claims a right of inspection for tax collection purposes (40b-41b, 20b-21b). Thereafter, the Government will surrender its key to Meissner's counsel.

---

* The only documents found in this box (on information and belief a letter appraising a painting and an empty envelope) were not seized but were taken into I.R.S. custody solely for the purpose of delivery to Meissner's counsel for ultimate return to his client. I.R.S. has stated that it will also entertain an application by Meissner or his attorney for immediate release of those papers contained in the Citibank box which are clearly of no intrinsic or collection value.

Issues Presented For Review

1. Did the District Court possess subject matter jurisdiction to entertain the Government's petitions?

2. Was the District Court correct in denying Meissner's motion to intervene and in ordering compliance with the levies?

3. Does Meissner's fugitive status mandate dismissal of his appeal?

4. Do the facts (a) that the Government has already obtained a portion of the relief sought in the District Court (information about the contents of the safe deposit boxes), (b) that the Government must seek a further order of the District Court to obtain custody of the contents of the Citibank safe deposit box and (c) that Chemical Bank has now complied with the administrative levy by surrendering the contents of its box to the I.R.S. preclude appellate review?

ARGUMENT

POINT I

The District Court possessed jurisdiction over these summary proceedings.

Analysis of whether the District Court possessed jurisdiction to grant the relief requested by the Government in a summary proceeding properly begins with a description of what relief the Government sought: judicial assistance in compelling compliance with I.R.S. levies and in the alternative, as interim relief, knowledge of the contents of the safe deposit boxes, as an aid to further tax collection activities. The levies themselves were self-executing and needed no judicial assistance for their effectuation,

26 U.S.C. § 6331; it was merely a *pro tanto* enforcement of the levies which was sought. The Government did not seek any determination of its property rights under the levies regarding the safe deposit boxes' contents, it did not seek any judgment concerning the liability of taxpayer Meissner for taxes owing and unpaid, and it did not seek any judgment concerning the liability of the banks for their failure to honor the levies. Had these or any other orders determining property rights been sought, a plenary action would most likely have been mandatory. *New Hampshire Fire Insurance Co. v. Scanlon,* 362 U.S. 404 (1960).

The Statute invoked by the Government and relied upon by the District Court for jurisdiction for the limited relief requested states:

> § 7402. *Jurisdiction of district courts*
>
> (a) *To issue orders, processes, and judgments.* The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica,* orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

A preliminary question is whether or not the phrase, "in civil actions," modifies all of the remainder of the sentence in which it occurs or merely a portion. Appellants contend that it restricts the entire sentence, so that the statute becomes one allowing the issuance of miscel-

laneous ancillary orders in tax actions, and nothing else. However, the language beginning with "and to render such judgments and decrees" is clearly unmodified by the beginning of the sentence, because that sentence has two separate and distinct parts. The first part grants jurisdiction in civil tax actions *to make and issue* various specified orders "*and* such other orders . . ." [emphasis supplied]. The second part grants general jurisdiction, in enforcing the internal revenue laws, *to render such judgments and decrees* as are necessary or appropriate [emphasis supplied.] The second part of the statute is a general grant of authority to do what is required to enforce the internal revenue laws in proceedings other than civil tax actions. *But c.f.* Moore, *Federal Practice*, ¶ 3.04 at 714 (2d Ed. 1974). Thus when the United States seeks limited relief merely to learn of the contents of a safe deposit box, but does not seek the adjudication of property rights or tax liability in a civil action, the federal courts in their discretion may grant such limited relief in summary proceedings.

Appellants' interpretation of the statute makes it a cipher. For the All Writs Act, 28 U.S.C. § 1651, the older statute,* grants the District Court the authority to issue ancillary orders including those mentioned in the above-quoted statute. It is unreasonable to infer that the Congress was merely recapitulating authority already clearly extant when Section 7402 was drafted. On the contrary,

---

* The All Writs Act dates back to the Judiciary Act of 1789. Moore, *Federal Practice* ¶ 110.26 (2d Ed. 1973). Section 7402 was first enacted as part of the Revenue Act of 1918, c. 18, § 1318 (approved February 24, 1919), 40 Stat. 1057, 1148. *Compare* the Revenue Act of 1916 (approved September 8, 1916), c. 463, § 20, 39 Stat. 756, 776. It has been essentially unchanged thereafter. We have been unable to find any significant legislative history concerning Section 7402 or any of its predecessor statutes, except that the word, "processes" was originally "process," and was changed without explanation.

the more reasonable interpretation is that the statute was intended as a supplementary grant of jurisdiction so that the United States District Court would never find itself powerless to enforce the internal revenue laws. This interpretation is bolstered by the last sentence of the section, which states that the *remedies* are in *addition* to those provided elsewhere. This language implies an interpretation by the draftsmen that there is a new grant of power in Section 7402, and not merely a recapitulation of authority previously granted.

Recognition of this grant of jurisdiction also eliminates the conflict claimed by appellants to exist between the summary procedure utilized herein and the requirements of the Federal Rules of Civil Procedure. As Professor Moore states,* ". . . *in the absence of statute*, a summary proceeding is not proper and any action must be properly commenced in accordance with Rule 3 [FRCP]" (emphasis supplied). In other words, where summary procedures are statutorily authorized, the general requirements of Rules 2, 3, *et seq.* of the Civil Rules defer to the particular statute. Section 7402 is such a statutory authorization.

In addition, the Congressional policy as evidenced elsewhere in the Internal Revenue Code mandates a summary procedure for the effectuation or enforcement of levies. *See* Sections 6331 *et seq.* Levies are clearly designed in the Code to be vehicles for prompt action, not dilatory litigation. Any litigation must be subsequent to the honoring of the levy. The levy is designed to allow immediate action to forestall prejudice to the nation's revenues. It requires no prior judicial approval, and is done in the I.R.S.'s own name, not that of a court. It is designed to provide a method for an immediate, in-

---

* Moore, *Federal Practice*, § 3.04 at p. 714 (2d Ed. 1974), quoted in Citibank's brief at 12.

contestable transfer of property rights from a taxpayer to the Government. If resort to the Courts is required all it should be by means of the most efficient procedure possible.*

If appellants are contending that a summary proceeding is against public policy or contrary to due process, irrespective of the correct construction of the Congress' intent in enacting Section 7402, two answers are in order. First, appellants misconstrue the term, "summary," if from that word they infer a lack either of a regularized procedure or of judicial control over the litigants. The instant petitions were filed with Judge Motley and made returnable by her before Judge MacMahon as the judge presiding in Part I, after being docketed by the deputy clerk for miscellaneous matters. The filing procedure was prescribed by Rule 6(B)(1) of the Rules for the Administration of the Individual Calendar Assignment System; the docketing was pursuant to the Court's practice of docketing all Internal Revenue Service summons enforcement or related proceedings on one master docket. Thereafter, Judge MacMahon applied the normal rules of procedure and evidence, as would have been done in any other case. There has been no showing of prejudice, and there actually was no prejudice to Meissner or either of the banks from the form of these proceedings.

A second sufficient response is that the Supreme Court has had innumerable occasions to consider the issues raised by appellants, whenever it has heard appeals involving summons enforcement proceedings. The Court has never raised any question concerning the propriety of such sum-

---

* The limited scope of the issues raised by the summary proceedings herein is emphasized by the fact that the Government has not obtained custody over the contents of the Citibank box, and has declared its intent to return to the District Court for further assistance. *See* Point IV B, *infra*.

mary proceedings. *See, e.g., Donaldson* v. *United States,* 400 U.S. 517, 528-529 (1971).

Assuming, however, (but not conceding) that summary procedures were improper herein, it does not follow that the District Court lacked jurisdiction to enter the orders appealed from. On this assumption, the Court possessed subject matter and personal jurisdiction, and merely violated a procedural rule. This does not warrant dismissal; in fact, defective petitions in tax cases have been treated as complaints, *Martin* v. *Chandis Securities Co.,* 128 F.2d 731, 734 (9th Cir. 1942), and the orders to show cause, which were personally served (at counsels' request) on counsel for the banks, can be deemed to be in lieu of summonses. *See* Rule 4(e) Fed. R. Civ. P., which suggests that orders can issue in lieu of summons. In addition, Section 7402 itself allows the District Court to issue whatever form of process would be appropriate in the circumstances.

In point of fact, the banks treated the petitions as complaints, and filed "answers." The sole substantive issue raised by the petitions was contested on the merits, was determined on the merits by the District Court, and is now before this Court. There are no facts in dispute. No purpose would be served by requiring the Government to return to the District Court and file a complaint (most likely accompanied by an order to show cause on a preliminary injunction or summary judgment motion) raising no issues not already decided.*

---

* Assuming further that Meissner is found to be entitled to intervene in the Chemical Bank proceedings, *but see* Point II (A), *infra.* Otherwise, no further litigation would eventuate with Chemical Bank, since it has in the interim complied with the levy. *See* Point IV C, *infra.*

POINT II

The District Court was correct in refusing to allow Meissner's intervention and in ordering compliance with the levies.

A. There is no basis for Meissner's intervention

The jurisdiction of this Court over a motion to intervene depends upon whether the motion was for leave to intervene as of right or permissibly.* *See* Rules 24(a), (b), Fed. R. Civ. P. If the former, the Court may review for error; if the latter, only for abuse of discretion. *Brotherhood of Railroad Trainmen* v. *Baltimore and Ohio RR. Co.*, 331 U.S. 519, 524-525 (1947); *Rosenblum* v. *United States*, 300 F.2d 843 (1st Cir. 1962). Assuming that the intervention sought was "of right,"** error was committed only if Meissner satisfied the requirements of Rule 24(a), *supra*. Those requirements are, that there be a statute conferring an unconditional right to intervene, or that there be a claimed interest relating to the property which is the subject of the action and proposed intervenor "may as a practical matter" otherwise be impeded from protecting that interest. *Id.*

No statute grants such a right of intervention. The sole statute which provides any right to relief regarding

---

* The discussion in this section of the brief assumes that Meissner is not equitably estopped from invoking the jurisdiction of the court, an issue we vigorously contest in Point III, *infra*.

** Meissner's original motion does not explicitly state whether it seeks intervention as a matter of right or permissive intervention; however, its tenor and the tenor of the legal arguments in its support make it evident that the motion was in fact one to intervene as a matter of right. If, on the other hand, Meissner's contention is that the District Court abused its discretion in denying permissive intervention, the argument falls of its own weight. No abuse of discretion has even been alleged.

levies is Section 7426 of the Internal Revenue Code. 26 U.S.C. § 7426(a)(1) and (2) allow suits by persons other than taxpayers for wrongful levy and surplus proceeds; Meissner, being the taxpayer herein, cannot avail himself of these provisions. Also, 28 U.S.C. § 2463 prohibits attempts to recover property taken for taxes otherwise than through the procedures of the Internal Revenue Code. A levy is a taking of property sufficient to bring the property within the Government's "possession" for the purpose of this statute. *Phelps* v. *United States*, — U.S. —, No. 74-121, 75-1 USTC ¶ 9467 (May 19, 1975); *United States* v. *Pittman*, 449 F.2d 623, 626-27 (7th Cir. 1971).

The statute relied upon by Meissner, 26 U.S.C. § 7403, is inapplicable on its face. It refers exclusively to intervention in actions by the United States to reduce liens to judgment or to enforce liens. Levies are entirely distinct from liens. The fact that the Government may possess a statutory lien on the property at issue herein (see 26 U.S.C. §§ 6321(a) and 6322) does not mean that Meissner can intervene in a proceeding to enforce a levy when such proceeding does not seek a judgment for the underlying tax liability. Generally, the United States will not bring a proceeding pursuant to § 7403 so long as there is a *bona fide* expectation that the taxpayer's tax court suit will be prosecuted. See *United States* v. *O'Connor*, 291 F.2d 520 (2d Cir. 1961).*

The issue therefore resolves itself into whether Meissner has a sufficient protectible interest in the contents of the boxes which cannot be safeguarded otherwise than by intervention. We submit both that he does not have such an interest, and that he has another forum. The interest to be protected must be as or more substantial than a lien; *Donaldson* v. *United States, supra; Mendenhall* v. *Allen*, 346 F.2d 326, 328 (7th Cir. 1965); *Rosenblum* v. *United*

* As noted above, Meissner's tax court suit was stayed; there can therefore be no question of failure to prosecute it at the present time.

States, supra, 300 F.2d at 84. However, Meissner's interest in the contents of the boxes was divested by the levy, which transferred all but nominal title to the Government. *Phelps* v. *United States, supra; United States* v. *Pittman, supra.* He therefore possesses an insufficient interest to intervene.

Furthermore, there are two alternate forums for Meissner to contest his tax liability—a tax court suit or a suit for refund in the District Courts; *Bob Jones University* v. *Simon,* 416 U.S. 725 (1974). If Meissner wishes to recover the contents of the safe deposit boxes before resolution of his Tax Court litigation, he can post appropriate bond or other security. The existence of such alternatives prevents Meissner from participating in this action. It is the Congressional intent that those be the forums in which he may protect his interest. Intervention by Meissner in this proceeding would be for the sole purpose of restraining efforts to collect the tax liability. Because the objective of such intervention is prohibited, intervention itself must be prohibited. *Bob Jones University* v. *Simon, supra.*

The only other interest alleged is the right to be free from an unreasonable search, under the Fourth Amendment, or from compelled self-incrimination, under the Fifth Amendment. Such a right, as noted by the District Court, is also amply protected elsewhere. The procedural remedies in criminal actions allow for suppression of illegal seized or compelled evidence and its fruits; *e.g., Wong Sun* v. *United States,* 371 U.S. 471 (1963). And the Tax Court possesses independent authority to review the legality under the Fourth Amendment of a seizure of evidence. *Suarez* v. *Commissioner,* 58 T.C. 792 (1972). In addition, a Fourth or Fifth Amendment claim is simply not an "interest" cognizable in resistance to a levy. *Boyd* v. *United States,* 116 U.S. 616, 623-624 (1886). Thus, the requisite nexus between Meissner and the contents of the boxes no longer exists. The alleged status of his claims as "constitutional"

is of no significance. *Alexander* v. *"Americans United," Inc.*, 416 U.S. 752, 759-760 (1974).*

Where taxpayer, as here, cannot (in light of the I.R.S. levy) claim actual or constructive possession of the property at issue, there can be no valid Fifth Amendment claim when the property is ordered delivered to the Government. As the Supreme Court has stated, in a different tax context:

> "Petitioner would, in effect, have us read *Boyd* [v. *United States, supra*)], to mark ownership, not possession, as the bounds of the privilege, despite the fact that possession bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment. To tie the privilege against self-incrimination to a concept of ownership would be to draw a meaningless line."

Couch v. *United States*, 409 U.S. 322, 331 (1973); *see also id.* at 335-336.

The authorities upon which Meissner relies may all be distinguished. *Reisman* v. *Caplin*, 375 U.S. 440, 450 (1964) has been restricted by *Donaldson* v. *United States, supra*, which holds that taxpayers may intervene in summons enforcement proceedings only if they possess the type of interest normally required for intervention, which we have demonstrated Meissner does not possess. Furthermore, a summons is fundamentally different from a levy in its legal

---

* In the alternative, we contend that any error committed in denying Meissner's motion to intervene was harmless. The motion alleged the arguments sought to be raised if intervention were allowed; these arguments were rejected. The same arguments are raised herein, and may be decided on the merits by this Court. Thus, even if he has not technically intervened, Meissner has participated throughout and has been afforded reasonable opportunity to present his contentions.

effect. A summons is not self-executing; resort to the Court by adversary proceeding must be had for process to compel attendance and testimony. All ordinary procedural and substantive defenses can be raised before the Court on the Government's application for its assistance; many are waived if not raised then. A levy, on the other hand, is "distraint or seizure by any means", 26 U.S.C. § 6331 (b), and is self-executing.

The case of *United States* v. *Guterma*, 272 F.2d 344 (2d Cir. 1959), also relied upon by Meissner, is not in point. *Guterma* merely involved a determination of whether a criminal defendant could intervene in litigation over a subpoena to allege possession of the property sought, and thereby establish a Fifth Amendment defense to its production. As we discuss in Point III, infra, the Fourth and the Fifth Amendments are not properly involved herein.

Maness v. *Meyers*, 419 U.S. 449 (1975), is equally distinguishable. The case holds that an attorney may not be subjected to contempt sanctions for advising his client to refuse to produce documents in a civil proceeding on Fifth Amendment self-incrimination grounds. Relevant to the Court's decision were four factors: (1) the privilege unquestionably applied to the type of quasi-criminal proceeding pending; (2) there was a risk that the submission by the client to the trial court's order for the production of the documents might have resulted in irretrievable loss of protected rights; the sole means of raising the issue sought to be raised is by the refusal to comply in the face of a contempt citation; (4) the propriety of the *client's* refusal to comply was not reviewed, with the resultant addition of the policy in favor of protection of the right to assistance of retained counsel in a proceeding in which there was need for professional advice, if not a *Miranda*-type right to counsel (*See* 419 U.S. at 466 n. 15). This case cannot possibly be applicable to the present proceedings which are to enforce civil levies.

B. The Government is entitled to enforcement of the levies

There are only two defenses which may be interposed to a levy: (1) that the person upon whom notice of levy has been served is not in possession of any property of the taxpayer, and (2) that the property is subject to prior judicial attachment or execution. 26 U.S.C. § 6332; *United States* v. *Sterling National Bank and Trust Co.*, 494 F.2d 919 (2d Cir. 1974). Citibank has asserted the first defense by claiming that Meissner is actually the person in "possession" of the box contents; the second defense is not available herein.

The status of any articles of "property" as property of the taxpayer impels a reference to the property law of the state. Similarly, "possession" is a matter to be determined under state law. It is affected by recitations in the safe deposit contract, but it ultimately depends upon the physical realities of the situation.

The law in the State of New York appears to be that a bank is the bailee of its renter-bailor safe deposit box owner. New York Banking Law § 317 (McKinney, 1971);* *Cohen* v. *Manufacturers Safe Deposit Co.*, 297 N.Y. 666 (1948); *Roberts* v. *Stuyvesant Safe Deposit Co.*, 123 N.Y. 57, 61 (1890); *cf. Alford* v. *United States*, 113 F.2d 885, 887 (10th Cir. 1940). However, the relationship is to an extent unique, and defies categorization; it possesses certain of the attributes of a landlord-lessee relationship. *See* New York Banking Law § 332 (McKinney 1971)** 240 N.Y. 187 (1925); *Carples* v. *Cumberland Coal Co.*, 240 N.Y. 187 (1925); 5 N.Y. Jur. *Banks* § 282. As essentially a bailee under New York law, the banks are in possession for present purposes.

---

* This section refers to safe deposit *companies*. It derives from N.Y. Sess. L. 1875 ch. 613 § 1. Presumably Citibank is a safe deposit company for the purposes of this statute.

** N.Y. Sess. L. 1958 C. 879 § 12.

Even if Citibank is not foreclosed by the state courts' determination of the relationship in the context of actions on the rental contracts, *National Safe Deposit Co.* v. *Illinois*, 232 U.S. 58, 68 (1914), public policy demands that the bank be the proper person to respond to a levy addressed to the contents of a safe deposit box.

The contents of the safe deposit boxes must be in *someone's* possession, and that someone must be either Citibank or Meissner. *Cf.* 26 U.S.C. § 6334(c). Logic and policy dictate that the banks, which control access to them, protect them, and can open them with relatively little inconvenience and no expense, should be deemed the persons in possession for levy purposes. *Cf. Couch* v. *United States*, *supra*, 409 U.S. at 331. As was stated in *Carples* v. *Cumberland Coal Co.*, *supra*, 240 N.Y. at 174:

> It would be unfortunate if a court could not authorize and the sheriff perform such acts as these. If a debtor could withdraw his property from the reach of creditors by simply placing it in a safe deposit vault, avoidance of responsibility for obligations would be made easy, and a broad and easily accessible highway opened for escape from an effective administration of the law.

Citibank is apparently concerned that the District Court has ordered it to "break its contract" of lease of the box. This is not at all what has occurred; what has occurred has been recognition of the ascendency of the United States' rights over the contract rights of the parties. The contract remains in force, but its existence does not materially hinder the United States' levy rights. *Phillips* v. *Commissioner*, *supra*. Once Citibank has satisfied itself that the levy is on its face valid and applicable to the property at issue (which has not been challenged herein), it must honor the levy. 26 U.S.C. § 6332(a); *National Safe Deposit Co.* v. *Illinois*, *supra*, 232 U.S. at 71.

Meissner apparently attempts to assert another defense to the levy, namely that it is in bad faith. The facts simply do not bear this out. *See* 23a para. 4. There was an extensive civil tax investigation of Meissner's taxes antedating his failure to appear before the Grand Jury as ordered and the subsequent order for his arrest. Meissner's extraterritorial residence, his failure to honor the Court's orders, and the issuance of a bench warrant for his arrest provided ample justification for the jeopardy assessment. *Irving* v. *Gray*, 479 F.2d 20 (2d Cir. 1973). Meissner's contention therefore fails, not only through failure ever to proffer specific evidence of faith, but also because the facts affirmatively demonstrate good faith.

POINT III

Meissner's appeal should be dismissed.

A. The Court should deny Meissner any consideration on equitable grounds

Meissner is presently, if not a fugitive, at least in contemptuous defiance of the District Court. It is uncontested that an order directing his appearance before the grand jury was signed, and that upon his noncompliance, he was ordered arrested. He has had notice of these orders for a substantial period of time, and still he has not obeyed.* His appeal should therefore be dismissed.

Although we do contend that he is a fugitive, the technical question of whether or not Meissner is a fugitive is not determinative of this issue:

> In order to constitute a fleeing from justice, it is not necessary that the course of justice should have

---

* He has not been adjudicated as being in contempt, but his refusal to obey a direct Court order is clearly an act of contempt which directly challenges the judicial process at an essential point in the judicial effectuation of criminal investigatory procedures.

> been put in operation by the presentment of an indictment by a grand jury, or by the filing of an information by the attorney for the government, or by the making of a complaint before a magistrate. It is sufficient that there is a flight with the intention of avoiding being prosecuted, whether a prosecution has or has not been actually begun.

Streep v. *United States*, 160 U.S. 128, 133 (1895); *see also Allen* v. *Georgia*, 166 U.S. 138, 141 (1897).

Meissner's intent is obvious. He knows of the possibility of a prosecution from the grand jury subpoena served on him. He is believed to be in a "safe haven" from which his I.O.S. associate, Robert Vesco, successfully resisted extradition. And he steadfastly refuses to return. The fortuity that Meissner is not required to travel further to avoid the reach of United States law does not denigrate from the conclusion that he is presently "in flight" so as to avoid subjecting himself to the criminal justice of the United States. *Streep* v. *United States, supra.*

There is a well-established rule that in criminal cases the flight of the defendant will result in the dismissal of his appeal. *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970); *See Ruetz* v. *Lash*, 500 F.2d 1227 (7th Cir. 1974), and cases cited therein, *id* at 1229. One of the reasons articulated has been lack of *in personam* jurisdiction; another has been mootness. But another major reason articulated by the courts seems to be a discretionary refusal to allow a "Janus-like" attitude toward the law, invoking it when expedient and disregarding it otherwise. *United States ex rel. Bailey* v. *Commanding Offier, etc.*, 496 F.2d 324, 326 (1st Cir. 1974). *Compare, National Union of Maritime Cooks and Stewards* v. *Arnold*, 348 U.S. 37 (1954).

The validity of this consideration was recently upheld by the Supreme Court, in *Estelle* v. *Dorrough*, Dkt. No.

74-479 (*per curiam*, March 17, 1975), 43 U.S.L.W. 3497. That case involved the appeal of a fugitive who had been almost immediately recaptured, and who was challenging the Texas statute which had mandated the dismissal of the then pending appeal of his criminal conviction because of his short-lived fugitive status. The Court upheld this statute against equal protection and due process challenges and took the occasion to reaffirm *Molinero's* statement that "[escape from custody] disentitles the defendant to call upon the resources of the Court for determination of his claims." *Id.* The dissent in *Estelle* makes clear the fact that the Court predicated its decision not upon lack of *in personam* jurisdiction, but upon a principle of protection of the integrity of the judicial process. *Id.* at 3498.

The grand jury is an indispensable part of the criminal process, and the duty to appear before it is unqualified. *Blair* v. *United States*, 250 U.S. 273, 281 (1919). The existence of a right to refuse to answer questions put by the grand jury is no excuse for a refusal to appear at all. *E.g., Hoffman* v. *United States*, 341 U.S. 479, 486 (1951). Meissner has challenged the integrity of the judicial process by refusing to submit to the District Court's order that he appear before the grand jury. He is therefore not entitled to be heard by this Court.

B. Meissner has waived his allegedly infringed rights by his refusal to subject himself to the jurisdiction of the Court

Meissner's brief on appeal contends that an improper procedure below deprived him of the opportunity to litigate his contentions that his Fourth and Fifth Amendment rights would be violated by the forced entry into the safe deposit boxes, and on the merits, that the entry did violate those rights. These contentions were raised in the District Court exclusively by attorney's representations;

Meissner never appeared to claim his rights in person nor did he submit any personal sworn statement (20a *et seq.*). An attorney cannot raise these issues on behalf of a client; the client must do it himself. Quite apart from the effects of his fugitive status, *see* discussion, *supra,* Point III A, Meissner's failure to personally appear is an effective waiver of those rights.

Meissner's brief contains no description of the particular rights being invoked, but only conclusory language regarding their alleged violation. However, in light of the absence of any discussion of the property rights in a safe deposit "lessee" (a subject covered by Citibank), and discussed at Point II, *supra,* we presume that it is essentially the Fifth and not the Fourth Amendment which primarily concerns Meissner.* Were Meissner invoking the Fourth Amendment, he would necessarily have to establish a sufficient property interest in the articles allegedly searched or seized. *See Donaldson* v. *United States, supra.* However, the discussion herein applies equally to Fourth Amendment claims as it does to Fifth Amendment claims.

The privilege against self-incrimination is an "intimate and personal one" adhering to the person of the claimant. *Couch* v. *United States, supra,* 409 U.S. at 327. Decisions of the Supreme Court make it clear that this privilege can only be asserted by the claimant *in proprio persona.* For example, in *Hale* v. *Henkel,* 201 U.S. 43, 69-70, (1906), the Court observed that the Fifth Amendment privilege "is purely a personal privilege of the witness" and "was never intended to permit [the witness] to plead the fact that some third person might be incriminated by his testimony, *even though he were the agent of*

---

* The meagerness of this showing, *see In re Horowitz,* 482 F.2d 72, 82 n. 11 (2d Cir.), *cert. denied,* 414 U.S. 867 (1973) is a point to be considered but we do not stress it, in light of the fact that Meissner was denied leave to intervene.

such person" (emphasis added). *See also, McAlister* v. *Henkel,* 201 U.S. 90, 91 (1906); *United States* v. *White,* 322 U.S. 694, 704 (1944); *Rogers* v. *United States,* 340 U.S. 367, 371-72 (1951). This Court has indicated the contrary, in *Colton* v. *United States,* 306 F.2d 633, 639 (2d Cir. 1962), *cert. denied,* 371 U.S. 951 (1963). However, the statement appears as a brief dictum in a case involving litigation between the Government and an attorney over the attorney-client privilege.* *Accord, United States* v. *Judson,* 322 F.2d 460 (9th Cir. 1963), *but see, Ziegler* v. *United States,* 174 F.2d 439, 447 (9th Cir.), *cert. denied,* 338 U.S. 822 (1949). The issue was also determined adversely to the Government by the Fifth Circuit, in *United States* v. *Kasmir,* 499 F.2d 444 (1974), *cert. granted,* 420 U.S. 906 (1975). Several other Circuits have taken a position in the Government's favor. *Bouschor* v. *United States,* 316 F.2d 451, 458-459 (8th Cir. 1963); *United States* v. *Goldfarb,* 328 F.2d 280, (6th Cir.), *cert. denied,* 377 U.S. 976 (1964); *accord, In re Fahey,* 300 F.2d 383, 385 (6th Cir. 1962); *United States* v. *Boccuto,* 175 F. Supp. 886, 888 (D. N.J.), *appeal dsmd.,* 274 F.2d 860 (3d Cir. 1959). We submit that these latter opinions present the better authority and that the *Colton* dictum should be disapproved.

There are important practical reasons why an attorney should not be permitted to invoke his client's privilege against self-incrimination—at least where, as here, the client is available to assert the claim for himself. The privilege against self-incrimination is not an automatic bar to the securing of evidence but, like other privileges, may freely be waived by the person entitled to claim it. Moreover, a claim of the privilege need not be accepted on its face. In appropriate circumstances, the court may inquire into the basis for the claim. *See Hoffman* v. *United*

---

* The issue is obliquely referred to in *In re Horowitz, supra,* 482 F.2d at 73n, without indication of the Court's position.

States, supra, 341 U.S. at 486. Indeed, with respect to documentary evidence, there may well be a need for a factual determination whether the documents sought are Meissner's private papers.

The District Court's denial of Meissner's motion to intervene, originally and as renewed, is immaterial for present purposes since it is abundantly clear from the record that Meissner does not intend to come forward himself and answer pertinent questions of the Court and counsel concerning the factual basis of the claim of privilege.*

POINT IV

Both appeals are defective.

The present appeals are defective for three independent but related reasons: (a) Citibank's and Meissner's appeals are moot insofar as they seek review of the Government's acquisition of knowledge concerning the contents of the two boxes, (b) Citibank's appeal concerning custody is premature, since no custody has as yet been obtained over the contents of its safe deposit box, and (c) Meissner's appeal concerning the acquisition of custody of the contents of the Chemical Bank box is dismissible because of Chemical Bank's interim compliance with the levy.

A. The appeals are moot as to the interim relief obtained

As noted above, what the Government sought through its petitions to Judge MacMahon was immediate compliance with its levies, and in the alternative, as interim relief,

---

* Of course, we contend that the District Court was correct in determining that he was not a proper party and denying him leave to intervene, *see* Point II A, *supra*.

knowledge of the contents of the boxes, as an aid to further tax collection activities. Meissner's and Citibank's stay applications were denied by this Court and the Supreme Court before entry into the boxes. Thereafter, the Government obtained its desired interim relief: it now knows what was in the two safe deposit boxes. This information has been disseminated to all Governmental personnel involved in the present collection activity whose duties require access to the information. Certain subsequent collection activity premised upon this information has also occurred. Where, as here, affirmance of the lower court's decision would ostensibly require the doing of an act which had already been done, and reversal would ostensibly avoid an event which had passed beyond recall, the case is moot. *Brownlow* v. *Schwartz*, 261 U.S. 216 (1923). *See Vesco* v. *S.E.C.*, 462 F.2d 1350 (3rd Cir. 1972).

The questions of whether the evidence gained at or through inventorying or seizure of the contents of the boxes should now be suppressed for all or for certain potential future uses are not properly before this Court at the present time. As noted above, those questions must await determination at subsequent trials or hearings where the admission of particular evidence is sought in a specific context and for a specific purpose. To attempt to catalogue all such possible evidentiary offers and the issues appertaining to each at this time would be rankest speculation.

Similarly, this Court is not being asked to decide the question of who has the right to "possess" the information acquired. Neither of the banks, nor anyone else to the Government's knowledge, has brought any action or sought any injunction or other relief under 26 U.S.C. § 7426, the exclusive remedy for non-taxpayers challenging levies. Insofar as the acquisition of knowledge is concerned, these appeals are now moot.

B. The order affecting the Citibank box is not final, and the appeals of that order are therefore premature

The order granting access to the Citibank safe deposit box contained a provision for delivery of the contents to the Government after opening (24a). However, Citibank raised a question not raised by Chemical Bank regarding the meaning of the term, "possession," in the order, in light of the Court's prior opinion. When the box was entered, it refused to surrender custody of the contents of the box. Instead, Citibank sought clarification from, and obtained a conference with the District Court. At that conference, the Court noted that the order submitted had not been measured against a counter-order, and might have gone beyond the relief determined in the previous opinion (11b, 16b). The Government responded that it was of the view that the word, "possession," meant physical delivery, and that it had the statutory right to immediate possession (13b *et seq.*), a view it still maintains. However, Judge MacMahon refused to order delivery of the contents until the Government bought the matter on by formal proceeding with papers (17b-19b). This has not yet been done, but further litigation in the District Court is imminent (see 20b-23b, 40b-41b).

Judge MacMahon directed that the contents of the box temporarily remain at the bank in what amounts to "joint" possession by the Government and the bank, subject to further order of the Court. Before Judge MacMahon issued his January 27, 1975 order, the Citibank box was under IRS seal due to the posting of a notice of seizure at the time of the levy. The possessory status of the box's contents remains essentially the same now, with control of the box requiring the cooperation of the Government and Citibank.

There has not as yet been a determination by the Government of the procedural form its next step will take;

whether a motion will be made in the context of the existing summary proceeding, whether a separate summary proceeding will be begun, whether a plenary action will be filed, or some combination of the above.* The result of this decision might obviate the necessity for review of procedural questions now raised. In fact, it may be that after such further litigation issues now being appealed will not be pursued.

The order of Judge MacMahon is not "final" because it is not one which "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States,* 324 U.S. 229, 233 (1945). It is not one which "embodies the essential elements of a final decision and clearly evidences the judge's intention that it shall be his final act in the case," *Jenkins* v. *United States,* 325 F.2d 942, 944 (3d Cir. 1963), but rather, when read together with Judge MacMahon's later statements, evidences an "issue concerning which the trial court has not yet made up its mind beyond the possibility of change." *Cinerama, Inc.* v. *Sweet Music, S.A.,* 482 F.2d 66, 70 (2d Cir. 1973).

> An order, judgment, or decree which leaves the rights of the parties to the suit affected by it undetermined—one which does not substantially and completely determine the rights of the parties affected by it in that suit—is not reviewable here until final decision is rendered . . .

Republic of China v. *American Express Co.,* 190 F.2d 334, 336 (2d Cir. 1951).

---

* The statements in the April 29 (40b) and May 21, 1975 letters (20b) concerning the anticipated form such further proceedings would take are therefore counsel's prediction rather than statements of fact. We do represent, however, that further actions will be taken.

Appellants' right to appeal to this Court rests on 28 U.S.C. § 1291, which limits review by the Courts of Appeals to "final decisions" of the District Courts. The policy behind the final judgment rule is to prevent piecemeal litigation and to "eliminate the need for separate appellate consideration of different elements of a single claim." *Cinerama, Inc.* v. *Sweet Music, S.A., supra,* 482 F.2d at 70; *Catlin* v. *United States, supra.*

> The effect of [Section 1291] is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. . . . The purpose is to combine in one review all stages of the proceeding that may be effectively reviewed and corrected if and when final judgment results.

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). *See also, Cobbledick* v. *United States,* 309 U.S. 323, 325 (1940); *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 474 (2d Cir. 1974).

The right of the Government to possess the contents of the Citibank box pursuant to its tax levy has not yet been finally determined. The appeals are therefore premature as regards this box, and must be dismissed.

C. Chemical Bank's compliance with the District Court order enforcing the administrative levy moots Meissner's appeal concerning the Chemical Bank box

Appellant Meissner seeks, among other things, to have this Court review the propriety of the Government's entry into the Chemical Bank safe deposit box. Chemical Bank initially opposed the Government's petition, but after the

filing of the District Court opinion on December 31, 1974, Chemical Bank submitted a counter-order providing for transferral of custody. Chemical did not seek a stay and at the inventorying of the box Chemical Bank surrendered custody without objection, and has not appealed. Chemical Bank's acquiescence moots this appeal as regards its box.*

Though the summary proceeding utilized by the Government herein is unique as regards a levy, the parameters of appealability have been well defined in the numerous cases brought to enforce summonses under the same statute.

The predominant view is that an appeal from an order directing compliance with an administrative summons for the production of books, records or other information becomes moot when the order is complied with. *Shupack* v. *Groth*, 498 F.2d 675 (5th Cir. 1974); *Kurshan* v. *Riley*, 484 F.2d 952 (4th Cir. 1973); *Vesco* v. *S.E.C.*, *supra*; *Baldridge* v. *United States*, 406 F.2d 526 (5th Cir. 1969). ***But see***, *F.T.C.* v. *Browning*, 435 F.2d 96 (D.C. Cir. 1970). There is therefore a lack of true adversity as regards the Chemical Bank proceeding and this Court's loss of jurisdiction is automatic, under the "case or controversy" requirement of Article III, Section 2 of the Constitution, and the judicial requirement of finality. *Cover* v. *Schwartz*, 133 F.2d 541 (2d Cir. 1942), *cert. denied*, 319 U.S. 748 (1943); *City of Detroit* v. *Grinnell Corp.*, *supra*.

* It is not contended that Chemical Bank could not have appealed. But Chemical has not appealed; the question is therefore, assuming Meissner is otherwise entitled to appeal, whether his appeal is also mooted by Chemical Bank's acquiescence.

CONCLUSION

For the reasons stated, the appeal should be dismissed for lack of appellate jurisdiction, or the decision of the District Court should be affirmed.

Dated: New York, New York
August 4, 1975.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

WILLIAM R. BRONNER,
STEVEN J. GLASSMAN,
Assistant United States Attorneys, Of Counsel.

Form 280 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING

CA 75-6008
75-6007

State of New York) ss
County of New York)

PAULINE P. TROIA, being duly sworn,
deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 4th day of August 1975 she served a copy of the within

Brief of govt.

by placing the same in a properly postpaid franked envelope addressed:

1) Neal J. Hurwitz, Esq., 745 Fifth Ave. NY NY 10022
2) R. Kenly Webster, Esq., Kennedy & Webster, Esqs., 888 17th St. Wash. DC 20006
3) Matthew C. Gruskin, Esq., Shearman & Sterling, Esqs., 53 Wall St NY NY 10005

And deponent further says she sealed the said envelopes and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this
4th day of August 1975

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1977